

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH HEFFLEY, JUDGE

DIVISION II

CA CR 06-697

ROMMELL GILL AND PATRICK GILL

March 7, 2007

APPELLANTS

APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY
[NO. CR2005-1748]

V.

STATE OF ARKANSAS

HONORABLE TIMOTHY DAVIS FOX,
JUDGE

APPELLEE

AFFIRMED

SARAH J. HEFFLEY, JUDGE

In separate incidents, Ben Spillyards and Luke Wise were beaten by a group of men at a Shell station in Little Rock. As a result of these attacks, appellants Rommell Gill and Patrick Gill, who are brothers, were each charged with second-degree battery as to victim Luke Wise, and third-degree battery as to victim Ben Spillyards. The prosecution also sought to enhance their sentences under Ark. Code Ann. § 5-74-108 (Repl. 2005), which provides for an increase in the sentencing range for those convicted of a crime of violence while acting in concert with two or more persons.

Rommell and Patrick were tried together in a bench trial. Rommell was found guilty of two counts of third-degree battery. Patrick was found guilty of second-degree battery concerning victim Luke Wise, but the State nolle prossed the third-degree battery charge with regard to victim Ben Spillyards. The trial court found sufficient evidence to sentence them both under Ark. Code Ann. § 5-74-108. Rommell was sentenced to concurrent terms of three years in prison, while Patrick was also sentenced to three years in prison.

On appeal, Rommell contends that the trial court erred in denying his motion for a directed verdict on the charge of third-degree battery as to the victim Ben Spillyards. He also challenges the trial court's decision to enhance the penalty range for both his convictions. Patrick argues that the trial court erred in denying his motion for a directed verdict on the charge of second-degree battery. Like Rommell, he also challenges the enhancement decision. Finding no error, we affirm.

At trial, Ben Spillyards, a high school student, testified as follows. He and a friend stopped at the Shell gas station on March 11, 2005. Rommell approached and accused Spillyards of talking about him and his friends. Spillyards had never met Rommell, but he knew of him because Spillyards had played basketball with Patrick. Patrick walked over and told Rommell to leave Spillyards alone.

Rommell later approached Spillyards a second time along with Daniel Brewer. Spillyards was also surrounded by roughly ten to fifteen of Rommell's friends. Rommell told Spillyards that he was going to hit him, but Brewer struck Spillyards first. Spillyards fended

off Brewer and turned to swing at Rommell when “all hell broke loose.” Spillyards said that ten or so of them began punching him in the back of the head and kicking him after he fell to the ground. He testified, “I was hit in the back of the head, pushed, pushed over the median, fell down, they came on top of me and kicked me, all that stuff.” He could not say that Rommell took part in this assault.

When Spillyards managed to escape toward his vehicle, he said that Rommell “came running up behind me and grabbed onto a tree branch and kicked me in the back.” Spillyards testified that when he got in the vehicle, “they came over and grabbed the door and were trying to rip it open, and they finally did rip it open. And Rommell kicked me in the stomach.” As a result of the initial attack, Spillyards said that he had bruising all over his face and that he was left with scars above his right eye and right ear. He said that Rommell was wearing cowboy boots and that his back was bruised where Rommell had kicked him.

Luke Wise, an employee at the Little Rock Air Force Base, stopped at the same Shell station on March 12, 2005. He was with his girlfriend, Courtney Hamby, and her friend Brittany Ozanich. According to Wise’s testimony at trial, Rommell tried to flirt with Ms. Hamby and Ms. Ozanich. Wise told Rommell that Hamby was Wise’s girlfriend and that Ozanich was engaged. Rommell responded that Ozanich’s fiancé “doesn’t have to know.” Wise said that he told Rommell in a joking manner that Ozanich’s boyfriend was on his way there and that he would tell him what Rommell said.

Wise testified that, as he and the girls were proceeding to their vehicle, Rommell

started hollering and accusing Wise of saying that he was going to jump Rommell. Patrick came around the side of the vehicle and told Wise that Rommell was his brother and that he [Patrick] was a pit bull and was going to tear Wise apart. Five or six more individuals began piling out of cars, including Jonathon Ray, who was wielding an axe handle. Wise said that he was surrounded and that the first blows came from the rear, “and after that it was pretty much a blur.” Wise recalled that Patrick struck him multiple times, saying that Patrick was “steadily punching” him in the face. As for Rommell, Wise said he remembered him “running in and doing some kind of karate kick into my thigh” three or four times. Wise estimated that the attack lasted twenty minutes.

Wise testified that Rommell was wearing steel-toed boots and that the kicks Rommell inflicted to his thigh left him bruised “from the bottom of my rear end to the top of my knee.” Wise also suffered a broken eye socket, a broken nose, a few broken teeth, torn cartilage in his ear, and multiple knots all over his head and face. Some of the vertebrae in his neck were knocked out of alignment. Wise spent six hours in the emergency room. Wise said that his nose was manipulated and glued back together. X-rays were taken of his eye socket, but it was not repaired. Afterwards, he missed work for two weeks. He received physical therapy for his neck three times a week for four months. Wise testified that for a while he could not bend his neck from side to side and that he could not turn his head without sending shooting pains down his back. He took pain medication for three months, and during that time he was relieved of his duties as a mechanic at the air base and worked a desk job instead. He had

a two centimeter scar on his nose, and several scars under his eye that had faded as of the time of trial. His off-base medical bills came to a little over \$8,000. Ms. Hamby and Ms. Ozanich confirmed Wise's testimony about the attack. They also identified Rommell and Patrick as two of Wise's assailants.

Both Rommell and Patrick challenge the sufficiency of the evidence supporting their respective convictions. This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). We affirm a conviction if substantial evidence supports it. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion beyond suspicion and conjecture. *Cook v. State*, 76 Ark. App. 447, 68 S.W.3d 308 (2002).

Rommell's Appeal

Rommell first argues that there is insufficient evidence to support his third-degree battery conviction as it relates to Ben Spillyards. A person commits the offense of battery in the third degree if, with the purpose of causing physical injury to another person, he causes physical injury to any person. Ark. Code Ann. § 5-13-203 (Repl. 2006). The term "physical injury" means the impairment of physical condition; the infliction of substantial pain; or the infliction of bruising, swelling, or a visible mark associated with physical trauma. Ark. Code Ann. § 5-1-102(14) (Repl. 2006).

Rommell contends that there is insufficient evidence proving that his kick to the back of Spillyards caused physical injury, because the bruising to Spillyards' back cannot be distinguished from the injuries he received in the initial attack. The State contends that this argument has not been preserved for appeal because he presented a different argument in his motion for a directed verdict. We agree.

When a defendant challenges the sufficiency of the evidence, he must apprise the trial court of the specific basis on which the motion is made. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000); Ark. R. Crim. P. 33.1. It is settled that arguments not raised at trial will not be considered for the first time on appeal, and parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Abshire v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). In his motion for a directed verdict made at trial, Rommell argued that he was entitled to defend himself because Spillyards had made an aggressive move toward him. On appeal, however, he argues that there is no sufficient proof that he caused physical injury to Spillyards. Because the appellant is raising an argument that was not raised below, we affirm on this point.

As his second point on appeal, Rommell challenges the trial court's decision to enhance the penalty for third-degree battery as it pertains to Ben Spillyards pursuant to Ark. Code Ann. § 5-74-108 (Repl. 2005), which provides:

- (a) Any person who violates any provision of Arkansas law that is a crime of violence while acting in concert with two (2)

or more other persons is subject to enhanced penalties.

(b) Upon conviction of a crime of violence committed while acting in concert with two (2) or more other persons, the classification and penalty range is increased by one (1) classification.

(c) The fact that the group was not a criminal gang, organization, or enterprise is not a defense to prosecution under this section.

This statute is part of the Arkansas Criminal Gang, Organization, or Enterprise Act, which was modeled after the federal continuing criminal enterprise statute, 21 U.S.C. § 848. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998). The phrase “in concert” signifies mutual agreement in a common plan or enterprise. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be proven beyond a reasonable doubt. *See Brock v. State*, 90 Ark. App. 164, 204 S.W.3d 562 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Thus the test on appeal is whether the trial court’s findings are supported by substantial evidence. *See Mulkey v. State*, 330 Ark. 113, 953 S.W.2d 149 (1997).

Rommell argues on appeal that there were two fights: the first being the assault by a number of individuals and the second being his assault of Spillyards as Spillyards tried to get to the car and leave. Rommell asserts that Spillyards could not identify him as one of the assailants in the group assault and that when he attacked Spillyards as he tried to leave, he acted alone. He thus contends that there is no substantial evidence to show that he committed a crime of violence against Spillyards while acting in concert with two or more individuals.

As with the first issue, we do not address the merits of Rommell’s argument because

it was not raised below. At trial, Rommell argued against enhancement under the statute with regard to victim Spillyards on the ground that:

The State is trying to claim that there was some type of an agreement or that they worked together, that they're accomplices. There's been nothing shown to justify that other than, as kids do, one guy gets in a fight, everybody and their brother jumps in, and they're going to jump in on whoever is winning at that particular time, Your Honor. And in this case, it was the Gill boys.

So, I don't believe the enhancement is proper. They did not act, encourage, aid, or solicit any of these people to participate in this act; so, therefore, the enhancement requiring two or more people – they acted in concert with two or more people, isn't justified, Your Honor.

As can be seen, Rommell argued in his motion that there was no concert of action because there was no evidence of an agreement or any showing that he encouraged anyone else to participate in the fight. On appeal, he argues that there were two different fights; the evidence supports the conclusion he only participated in the second one, and he acted alone. The contemporaneous objection rule applies to sentencing enhancement. *See Mackey v. State*, 329 Ark. 229, 947 S.W.2d 359 (1997). Because appellant has changed the grounds for his objection on appeal, we do not address this particular argument. *Abshure v. State, supra*.

As his third point, Rommell contends that there was no evidence to support the enhancement as to his conviction for third-degree battery involving Luke Wise. It is his argument that, because the trial court found him guilty of the lesser-included offense of third-degree battery, the trial court necessarily found that he was not an accomplice to Patrick, who

was found guilty of second-degree battery. Thus, he argues, if he was not an accomplice, there could be no evidence to support a finding that he acted in concert with others in the attack on Wise. We do not find this argument persuasive.

The trial court's decision to find Rommell guilty of third-degree battery, rather than second-degree battery as he was charged, is consistent with Ark. Code Ann. § 5-2-406 (Repl. 2006), which provides that when two or more persons are criminally liable for an offense of which there are different degrees, each person is liable only for the degree of the offense that is consistent with the person's own culpable mental state or accountability for an aggravating fact or circumstance. In *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985), one defendant was charged with first-degree battery, and the other defendant was charged as an accomplice to first-degree battery. The trial court found the defendant who stabbed the

victim guilty of first-degree battery, and the defendant who only encouraged the attack guilty of second-degree battery. On appeal, they argued that the verdicts were inconsistent and thus contrary to the law. We disagreed, finding no inconsistency in light of the above-mentioned statute.

The trial court's decision here was also a proper application of the statute. The evidence showed that Rommell repeatedly kicked Wise in the thigh, which caused significant

bruising. Thus, the trial court found that by kicking Wise in the thigh Rommell acted with the purpose of causing physical injury, but not serious physical injury, as is required for second-degree battery. *See* Ark. Code Ann. § 5-13-202(a)(1) (Repl. 2006). Moreover, the fact that the trial court found Rommell guilty only to the degree of his culpability does not logically compel the conclusion that Rommell was not a participant in the attack. We find the contrary to be true, inasmuch as Rommell was indeed found guilty of third-degree battery, and there is substantial evidence that this crime was committed during the course of a group beating.

Patrick's Appeal

Patrick argues that there is insufficient evidence to support his conviction of second-degree battery. A person commits the offense of battery in the second degree if, with the purpose of causing physical injury, he causes serious physical injury to another person. Ark. Code Ann. § 5-13-202(a)(1) (Repl. 2006). The phrase “serious physical injury” means

physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Ark. Code Ann. § 5-1-102(21) (Repl. 2006).

Patrick argues that the evidence is not sufficient to show that Wise suffered serious physical injury. We disagree. Mr. Wise was the victim of a brutal attack. He sustained a

broken eye socket, a broken nose, the loss of teeth, torn cartilage in his ear, and numerous contusions and knots covering his head and face. Vertebra in his neck were knocked out of alignment. During the six-hour emergency room stay, his nose was repositioned and glued back together. He lost two weeks of work. According to Wise, the neck injury alone caused him considerable discomfort and pain. For three months, he could not function without the use of pain medication. He lost full range of motion in his neck, and this condition required four months of treatment and physical therapy. During this time, he could not perform his regular job duties. It cannot be said that there is no substantial evidence to support the finding that Wise suffered serious physical injury. *See Black v. State*, 50 Ark. App. 42, 901 S.W.2d 849 (1995) (holding that substantial evidence supported second-degree battery conviction where the victim sustained multiple facial lacerations, permanent scarring, broken ribs, and ruptured eardrum).

For his second point on appeal, Patrick argues that since he was convicted of second-degree battery and Rommell was convicted of third-degree battery as to Wise, they could not have been accomplices, and thus, could not have acted in concert as required to enhance his sentence pursuant to Ark. Code Ann. § 5-74-108. This is the same argument presented by Rommell. As we previously discussed, we find no merit in this argument.

Affirmed.

VAUGHT and MILLER, JJ., agree.